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## *Privatising Land in England*

Of all the recent privatisations in England, the most valuable, and yet least recorded, is of land. According to one estimate, two million hectares, or ten percent of the Britain landmass, left the public sector for private ownership between 1979 and 2018.<sup>1</sup> Many of these sales have been piecemeal. The housing *Right to Buy* programme consists of nearly two million individual sales, raising an estimated £40 billion by 2018.<sup>2</sup> The One Public Estate programme, now in its fifth iteration, facilitates sales of surplus local authority assets, aiming to raise £615 million in capital receipts by 2019-20.<sup>3</sup> Central government sales are escalating from the five “main land owning departments”<sup>4</sup>, including releasing land for 235,000 (almost all privately developed) new homes. The Ministry of Defence, the government’s largest landowner, is executing the *Better Defence Estate Strategy* to reduce the built estate by 30% by 2040.<sup>5</sup> NHS Property Services Ltd Land aim to release a further £2 billion’s worth of property.<sup>6</sup> Network Rail, a public sector company, recently sold the spaces beneath the railway arches for £1.46 billion to Telereal Trillium and Blackstone Property Partners, who have created the Arch Company, the single largest small business landlord in England and Wales.<sup>7</sup> Central government sales of over 1000 properties have already added £2 billion to government coffers and saved £300 million per annum in running costs, including significant reductions in the numbers of civil servants.<sup>8</sup> The metaphorically ‘small state’ is also a physically small state.

The privatisation of land is not solely an English phenomenon, occurring in Canada, France, and Italy as well, albeit in distinctive ways.<sup>9</sup> In England, land sales have taken place at many points in history, not least when Henry VIII sold off monastic lands to private buyers. Monarchs frequently gave away land to favourites and centuries of enclosures translated complex forms of common ownership into private property. In recent years sales have been ideologically associated with privatisations in the 1980s (British Airways, BP, British Gas, British Steel and British Telecom), the 1990s (British Rail), and occasional later (Royal Mail, but not the Forest Estate or Her

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<sup>1</sup> Brett Christophers, *New Enclosures: The Appropriation of Land in Neoliberal Britain* (Verso, 2018)

<sup>2</sup> House of Commons Library *Introducing a voluntary Right to Buy for housing association tenants in England* (Briefing Paper Number 07224, 25 October 2018).

<sup>3</sup> Local Government Association ‘About One Public Estate’ <<https://www.local.gov.uk/topics/housing-and-planning/one-public-estate/about-one-public-estate>> accessed 4<sup>th</sup> April, 2019

<sup>4</sup> Ministry of Defence (MoD), Department of Transport (DoT), Ministry of Housing, Communities and Local Government/Homes England (MHCLG/HE), Department of Health and Social Care (DHSC) and Ministry of Justice (MoJ), see MHCLG, *Public Land for Housing Programme 2015 – 2020* (2018) 6

<sup>5</sup> Cabinet Office, *National Estate Strategy* (2018) 25

<sup>6</sup> Department of Health and Social Care, *Government Response to the Naylor Review* (2018) 5

<sup>7</sup> Telereal Trillium, “The Arch Company launches as sale of Network Rail Commercial Estate is completed” available at < <http://www.telerealtrillium.com/media/press-releases/the-arch-company-launches-as-sale-of-network-rail-commercial>> accessed 5<sup>th</sup> April, 2019

<sup>8</sup> Cabinet Office, *National Estate Strategy* (2018) 5

<sup>9</sup> Felix Adisson and Francesca Artioli ‘Four types of urban austerity: Public land privatisations in French and Italian cities’ *Urban Studies* (2019) 1-18 and Heather Whiteside ‘The state’s estate: Devaluing and revaluing ‘surplus’ public land in Canada’ *Environment and Planning A* (2018, 51(2)) 505–526

Majesty's Land Registry in the 2000s). Under Margaret Thatcher's governments, the aims of privatisation were to reduce the size of the state-controlled sector of the economy, to increase the proportion of assets owned privately and to promote efficiency. While Thatcher, who disliked the term, used privatisation to refer to the sale of state-owned industry through public share offerings<sup>10</sup>, privatisation also includes both the sale of council houses ("right to buy") as well as the private provision of public services (often carried out as compulsory competitive tendering, for example, in parks, on highways and refuse collection and later, under Labour governments, under "best value" tendering).<sup>11</sup>

Today, the central government policy of land privatisation aims to reduce the size of the national estate to maximize capital receipts, reduce running costs and release land for housing. The *National Estate Strategy* is explicit in its aim to be more "commercial and professional".<sup>12</sup> In addition to release land for housing, central government also facilitates sales by local authorities through the One Public Estate programme creating partnerships "set to create 44,000 new jobs, release land for 25,000 homes, raise £615 million in receipts from sales, and cut running costs by £158 million" by 2020.<sup>13</sup> Local authorities themselves also initiate sales, not least to address the financial effects of extraordinary financial austerity: local government finance has been reduced by an estimated 56.3% between 2010/11 and 2019/20.<sup>14</sup> Lastly, the right to buy housing programme continues apace. The scheme was "reinvigorated" in England 2012, with increased discounts (up to £108,000 in London and £80,900 outside of London)<sup>15</sup>, despite having ended in Scotland in June 2016 and in Wales in January 2019.<sup>16</sup>

Each strand of privatisation – the sale of industry, assets, services or council housing – has implications for land with the transfer of state property into private ownership. The 1980s and 1990s privatisations reversed many of the post-war 1945-1951 nationalisations, and it is of course possible that subsequent policies might renationalise services and assets. Yet these sales raise the question how, from a land law perspective, privatisations matter. What are the legal implications when land is

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<sup>10</sup> Richard Stevens 'The Evolution of Privatisation as an Electoral Policy, c.1970–90' *Contemporary British History* (2004, 18:2) 47-75

<sup>11</sup> Philip L. Pinch & Alan Patterson 'Public Sector Restructuring and Regional Development: The Impact of Compulsory Competitive Tendering in the UK' *Regional Studies* (2000, 34:3) 265-27, Steve Martin 'Implementing 'best value': local public services in transition' *Public Administration* (2000, 78(1)) 209-227.

<sup>12</sup> Cabinet Office, *National Estate Strategy* (2018) 3

<sup>13</sup> *Ibid*, p. 22

<sup>14</sup> National Audit Office, *Financial sustainability of local authorities 2018* (2018) 15

<sup>15</sup> Ministry of Housing, Communities and Local Government, *Use of receipts from Right to Buy sales: Consultation* (2019)

<sup>16</sup> The Housing (Scotland) Act 2014 and Abolition of the Right to Buy and Associated Rights (Wales) Act, respectively. In England, although a pilot Voluntary Right to Buy ballot was introduced for housing association tenants (without a preserved right to buy) began in the Midlands in August 2018, no national rights have yet been implemented. The Labour Party have said that, if elected, they "will suspend right-to-buy, allowing councils to reinstate it only if they can prove a plan to replace homes sold one-for-one and like-for-like" (The Labour Party, *Labour's New Deal on Housing* (2017) 13).

transferred from state to private ownership? If people are still housed, have spaces to come together or enjoy, does it matter if the landowner is a government or private body? The answer is that there are legal differences, most striking in housing but also relevant to the use of open or negotiable spaces as well as for sites where human rights can be exercised. More profoundly, there is a change in property discourse when land is owned by the state, where there is discursive, if not legal, space for arguments about collective interest, conceptions of value and transparency. While corporations are primarily accountable to their shareholders, governments – both central and local – are accountable to their electors and citizens, creating very different discourses around land ownership and use.

To consider privatisation in the context of land, it is useful to understand the changes as “denationalisation”, an alternative word for privatisation but one apparently considered too negative to be electorally popular in the 1980s United Kingdom.<sup>17</sup> Denationalisation captures the effects of selling state property, rather than public property, a difficult term, which includes public access, open commons and public goods.<sup>18</sup> State property is, according to C.B. Macpherson, “(corporate) private property” with a “corporate right to exclude”.<sup>19</sup> As he noted, state property is not public property for “the state, in any modern society, is not the whole body of citizens but a smaller body of persons who have been authorized (whether by the whole body of citizens or not) to command their citizens.” State property is also distinguishable from non-exclusive common property. As Macpherson concludes: “State property is an exclusive right of an artificial person”<sup>20</sup>, it is not public property as commonly understood.

To consider the effects of privatising (denationalising) state property this paper will now consider four questions: (1) what government ownership (whether central or local) implies for management and disposal; (2) the housing law implications of the Right to Buy programme; (3) the distinctive rules for state-owned spaces; and (4) the discursive possibilities of state property.

### 1. *Government Property*

Property owned by the state is, in English land law terms, indistinguishable from privately owned property. There is no allodial land ownership in England. Estates, for all landowners, can only be freehold or leasehold while interests in land such as mortgages, easements and equitable interests apply equally to public and private landowners. Even though the right to property under Article 1, Protocol 1 is often

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<sup>17</sup> Institute for Government the Privatisation of British Telecom, 19840  
<[https://www.instituteforgovernment.org.uk/sites/default/files/british\\_telecom\\_privatisation.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/british_telecom_privatisation.pdf)> last accessed 6<sup>th</sup> April, 2019

<sup>18</sup> John Page *Property Diversity and its Implications* (Routledge, 2018)

<sup>19</sup> Crawford Brough ed. *Property, mainstream and critical positions*. Ty of Toronto Press, 1978, Vol. 214) 5

<sup>20</sup> Ibid, p6

claimed against public landowners<sup>21</sup>, public landowners also have their own property rights both at common law and the ECHR.<sup>22</sup> Similarly, registration requirements apply to government owned property in the conventional way. There is no *ex ante* distinction between public and private property: both are litigated in the same courts.<sup>23</sup>

While there are no specific land law rules on state or public landowners, public law rules do however apply, including the obligation for government bodies to act *intra vires*. Although it probably marks the high-water mark of this line of thinking, Laws J. (as he then was) held in a much-cited 1995 case, *Regina v. Somerset County Council ex parte. Fewings and Others*, that it is a “sinew of the rule law” that “a public body, such as a local authority, enjoys no such thing as an unfettered discretion.” While private landowners may do “anything [they] choose which the law does not prohibit”, for public landowners “any action to be taken must be justified by positive law”.<sup>24</sup> Councillors and other governmental decision makers must have their attention drawn to the relevant statutory provisions affecting decisions about land, otherwise, “if a decision is lawful, it is more by good luck than judgment.”<sup>25</sup>

The statutory frameworks, within which public bodies hold property, matter. In *Fewings*, the dispute centred around the Council’s decision to forbid stag hunting on its land in the Quantock Hills, and the question was whether the local authority “acted lawfully in making the decision it did on the grounds it did”.<sup>26</sup> The question of lawfulness was framed in terms of the local authority’s obligations at the time of the acquisition of the land in 1921, now effective as s120 of the Local Government Act 1972, so that the land should provide for the “benefit, improvement or development of their area”. Did the hunting prohibition provide this? The courts (both at first instance and in the Court of Appeal) held that: “... it is not lawful for [local authority landowners] to do anything save what the law expressly or impliedly authorises. [They] enjoy no unfettered discretions. There are legal limits to every power [they] have ... the rule for local authorities is that any action to be taken must be justified by positive law.” Prohibiting hunting was a step too far for this local authority landowner, even though it might have achieved the same result by the use of bylaws.

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<sup>21</sup> For instance in *Sims v Dacorum BC* [2014] UKSC 63

<sup>22</sup> *Corporation of London v Samede* [2012] EWCA Civ 160, per Neuberger LJ, paras 8 and 39

<sup>23</sup> For the French perspective, see Jane Ball ‘The Boundaries of Property Rights in English Law’ *Report to the XVIIth International Congress of Comparative Law, July 2006* <<https://www.ejcl.org/103/art103-1.pdf>> accessed 6<sup>th</sup> April, 2019

<sup>24</sup> *R v Somerset County Council ex p Fewings* [1995] [1995] 1 All E.R. 513, 524

<sup>25</sup> Sir Thomas Bingham in the Court of Appeal, *R v Somerset County Council, ex parte Fewings and others* [1995] 3 All ER 20 and also Supperstone J. in *R. (on the application of West) v Rhondda Cynon Taff CBC* (Supperstone J. was the losing counsel in *Fewings*).

<sup>26</sup> *R v Somerset County Council, ex parte Fewings and others* [1995] 3 All ER 20, 23

Courts have differed over the extent of the restraints imposed by statutory frameworks on local authorities acquiring, appropriating or disposing of land<sup>27</sup> and their implications for *ultra vires*. Some decisions have drawn a distinction between purely private transactions, on usual commercial terms, and political decision-making, where decisions require higher degrees of judicial scrutiny.<sup>28</sup> There are, certainly, decisions where local authority landowners have lost in cases of judicial review. In *Galaxy v Durham County Council*, for example, a dispute concerned with the sale of land for housing, Cranston J held that while “[o]rdinarily a decision of a Council to sell land is a private matter, not amenable to judicial review ... judicial review is possible where there is a public law element to the decision making process ... An attempt to give effect to planning policy or objectives is sufficient to inject a public law element into a decision”.<sup>29</sup> Similarly, when a local authority refused to offer a lease renewal to a solicitor who brought “trip and slip” suits against the council, Stephen Davies J. held in *Trafford v Blackpool Borough Council* that this decision could not stand, having been subject to an improper purpose, *Wednesbury* irrational and tainted by illegality. Drawing in the public sector equality duty, McKenna J. held that *R v London Borough of Ealing ex parte Mohinder Pal*, that a decision to sell a building to a Hindu temple was flawed as the council had failed to consider the public sector equality duty in its decision-making.<sup>30</sup> Even with Brexit on the horizon, land disposals will continue to fall under procurement rules.<sup>31</sup> However limited these provisions may be, when sites are privatised, even if the use survives, this public law framework for land ownership disappears.

While the legal restraints on state landowner use are minimal, the discursive constraints are extensive. Much work has gone into crafting a cohesive management scheme for property owned by central government departments and public bodies, particularly since 2010.<sup>32</sup> The aim of the first 2013 Government’s Estate Strategy was to “create an efficient, fit-for-purpose and sustainable estate that meet future needs”.<sup>33</sup> By its next incarnation, the 2018 National Estate Strategy had three pillars: (1) Driving Growth and Opportunity; (2) Supporting a Brilliant Civil Service; and (3)

<sup>27</sup> Including, for acquisition, under ss121, 124 and 125 Local Government Act (LGA) 1972, s226 Town and Country Planning Act (TCPA) 1990 and s.164 of the Public Health Act 1875; appropriation ss122 and s126 LGA 1972 and s229 TCPA 1990 and disposal s123 LGA 1972 and s233 TCPA 1990.

<sup>28</sup> See, for instance, *R. v. Bolsover District Council, ex p. Pepper* [2000] 10 WLUK 101, *R. (on the application of Salford Estates (No 2) Ltd) v Salford City Council* [2011] EWHC 2135 (Admin) and *R. (on the application of Lemon Land Ltd) v Hackney LBC* [2001] EWHC Admin 336

<sup>29</sup> *R (on the application of Galaxy Land Ltd) v Durham County Council* [2015] EWHC 16 (Admin) citing *R. v. Bolsover District Council, ex p. Pepper* [2001] J.P.L. 804

<sup>30</sup> Equality Act 2010, s149. *R (on the application of Mohinder Pal) v London Borough of Ealing* [2018] EWHC 2154

<sup>31</sup> Currently, see Cabinet Office, Guide to Land Disposals, 2017 and *Gottlieb, R (On the Application Of) v Winchester City Council* [2015] EWHC 231 (Admin), *Wylde v Waverley Borough Council* [2017] EWHC 466 (Admin). In case of a no deal Brexit, The Minister for the Cabinet Office is to take over responsibility for changes to Common Procurement Vocabulary codes and for setting the financial thresholds for the applicability of UK procurement rules.

<sup>32</sup> For earlier initiatives see Peter Wyatt (2004) Constructing a land-use data set from public domain information in England, *Planning Practice and Research*, 19:2, 147-171

<sup>33</sup> Cabinet Office, *Government Estate Strategy* (2013) 2

Delivering Value, committing under this last ‘Value’ head to “Better Asset Management” where the Government are committed to adopting “a more commercial approach to asset management, with the financial and strategic tools to deliver property projects that can drive efficiencies and deliver transformational change”<sup>34</sup>, which have produced the £2 billion in capital receipts and £300 million yearly running costs.<sup>35</sup>

The newly created Government Property Agency (GPA), located within the Government Property Unit (GPU), itself located within the Cabinet Office, is to “deliver a more commercial approach to property – reducing operating costs, increasing disposals and driving greater value across departments”. This explicitly “commercial” approach is underpinned by a commitment that sales should leave the public sector for private owners. For sites subjects to “national property controls”, lease renewals, sales or acquisitions on new properties are not allowed without Cabinet Office approval. The GPU has overseen these controls, which following a 2010 moratorium on new leases or lease extensions now “discourage departments from new lets or renewing existing leases” to encourage “financial discipline”.<sup>36</sup>

These central government properties are also subject to ambitious management targets. The *National Estate Strategy* mandates that any new buildings coming into the public estate “will meet targets for the top quartile rating for energy use, and we will monitor the energy performance of all buildings to assess progress against the minimum energy efficiency standards”.<sup>37</sup> Similarly, sustainability standards will be introduced and reported on.<sup>38</sup> Space usage is to be closely reviewed. The strategy proudly announces that Government has “reduced the vacant space within our central estate to only 1.5% (the private sector average is 7.5%), with an average property cost of £493 per sq m (£40 per sq m less than the average for the private sector).”<sup>39</sup> Both in the pursuit of best practice and in the repeated push for transparency, government property is managed in distinctive ways, restraining state landowners through policies and practices (as well as law) from acting as freely as a private landowner might.

Bringing together long fragmented and disparate governmental properties into one administrative agency facilitates significant central authority and control over a now singular ‘estate’. The GPA is, effectively, a real estate panopticon, expected to rationalise the estate, with explicit targets to deliver £3.6 billion of savings over 20 years.<sup>40</sup> The Agency collects data and implements a form of oversight (or surveillance) to bring public sector property together providing, as they say, “for a

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<sup>34</sup> Ibid. p. 7

<sup>35</sup> Ibid. p. 5

<sup>36</sup> National Audit Office, *Progress on the government estate strategy* (2017) 29 and 32

<sup>37</sup> Cabinet Office, *National Estate Strategy* (2018) 36

<sup>38</sup> Ibid, p. 17

<sup>39</sup> Ibid, p. 5

<sup>40</sup> Cabinet Office, *National Estate Strategy* (2018) 16

sustainable and efficient estate” within the broader strategic aims of raising capital receipts, saving running costs and releasing land for housing.

The GPA builds on transparency requirements for local authorities (who generally own property in their own names). Justifications for transparency about assets include citizen awareness, the possibility for joint ventures and the ability to alert potential purchasers, including under “the right to contest”, where since 2014 any member of the public, business or local authority may challenge government about a site if, for example, the site is potentially surplus or redundant or could be put to better economic use.<sup>41</sup> The updated 2018 Treasury guidance *Managing Public Money* states that “[i]t is good practice for public sector organisations to take stock of their assets from time to time and consider afresh whether they are being used efficiently and deliver value for public funds. If there is irreducible spare capacity there may be scope to use part of it for other government activities, or to exploit it commercially for non-statutory business.”<sup>42</sup>

Transparency also matters. The Guidance confirms that public sector organisations should keep an up to date “register of all the assets it owns and uses. This will usually be needed for preparation of its financial accounts. It is also essential to undertake regular stock taking of the organisation’s current assets base and thus for planning change.”<sup>43</sup> Local authorities are bound by the 2015 Transparency code, requiring publication of information about all local authority property and building assets.<sup>44</sup> Lastly, the 2016 Housing and Planning Act requires all local authorities to create registers of brownfield and public sector land suitable for development, to encourage more sites to be brought forward<sup>45</sup>, with “permission in principle” granted for land on brownfield registers to speed up housebuilding.<sup>46</sup>

These transparency and listing requirements matter because land registration in England rests on the registration of titles, either freehold or leases over seven years.<sup>47</sup> The system rejects cadastral mapping, making data compilation of ownership on a

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<sup>41</sup> The right to contest procedure now also includes the Community Right to Reclaim Land for Government land under Schedule 16 of the Local Government, Planning and Land Act 1980, though this procedure has rarely been used. See House of Commons Library, *Assets of Community Value* (Briefing Paper, Number 06366, 19 December 2018, Mark Sandford) 15-16

<sup>42</sup> HM Treasury *Managing Public Money* (2013, updated March 2018) 4.10.2

<sup>43</sup> Ibid, Annex 4.15

<sup>44</sup> Department of Communities and Local Government, *Transparency Code 2015* (2015) para. 35

<sup>45</sup> Planning and Housebuilding Act 2016 s151, inserting s14A into the Planning and Compulsory Purchase Act 2004 and the Town and Country Planning (Brownfield Land Register) Regulations 2017

<sup>46</sup> Housing and Planning Act 2016 s50 inserts a new section 58A into Part 3 of the Town and Country Planning Act 1990 enabling permission in principle to be granted for housing-led development of land in England. Section 150(3) amends section 70 of the 1990 TCPA so that an application for technical details consent is also required. Permission and principle and the grant of an application of technical details consent combine to grant of full planning permission.

<sup>47</sup> Land Registration Act 2002



geographical scale extraordinarily difficult.<sup>48</sup> Once individual sites are listed on Government websites with postcodes and associated detail, it is, however, quite straightforward to enter for prospective purchasers to enter into negotiations or to look up estate details at the Land Registry. Information about land use and collecting data for taxation is longstanding, the National Land Use Database in the 1990s was important to understand land use from a spatial perspective.<sup>49</sup>

This is why lists and transparency along with “developer partner panels” have facilitated privatisation, particularly in housebuilding.<sup>50</sup> For although the 2015 Self-build and Custom Housebuilding Act obliges local authorities to keep registers of those who are looking for land for custom or self-build housing (revised in 2016 to add a duty to grant sufficient numbers of development permissions to reflect this demand<sup>51</sup>), extraordinarily little land is available for individuals so that self-build at best is, at best, failing to flourish and, at worst, may be continuing to decline.<sup>52</sup> Community land trusts (CLTs) have also struggled to acquire released sites. CLTs complain that trusts have not been effectively integrated into public land disposal plans and have, instead, they often have to ally themselves with a private developer partner bidding for a site to acquire land to develop at a small scale.<sup>53</sup> Many, particularly Labour and larger, local authorities have taken a more strategic path of resistance to privatisation, setting up over 158 local authority housing companies, attempting to develop their own public housing at scale rather than release land solely to the private sector.<sup>54</sup>

A further difficulty in respect of disposals is that legal disposals apply, particularly to local authorities that may sell freeholds, grant leases, assigning unexpired leasehold terms or grant easements.<sup>55</sup> Local authorities must achieve the “best consideration”

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<sup>48</sup> Kevin Cahill *Who Owns Britain* (Canongate Books Ltd, 2001), Guy Shrubhole, *Who Owns England* (William Collins, 2019)

<sup>49</sup> Peter Wyatt, ‘Constructing a land-use data set from public domain information in England’, *Planning Practice and Research* (2004, 19:2, 147-171)

<sup>50</sup> Ministry of Housing, Communities and Local Government *Public Land for Housing Programme 2015-2020* (August 2018, updated) 32

<sup>51</sup> Housing and Planning Act, 2016, s. 10

<sup>52</sup> House of Commons Library ‘Self-build and custom build housing (England)’ (Briefing Paper, Number 06784, by Wendy Wilson, 1 March 2017)

<sup>53</sup> Tom Archer, Stephen Green and Charlie Fisher, *Helping Communities A review of the Community Land Trust Funds and lessons for future* (2019) < <https://www4.shu.ac.uk/research/cresr/sites/shu.ac.uk/files/helping-communities-build.pdf>> accessed 5<sup>th</sup> April, 2019

<sup>54</sup> Janice Morphet and Ben Clifford ‘Progress and current trends in local authority housing provision’ *Journal of Urban Regeneration & Renewal* (2018, 11.4) 324-334, Paul Hackett ‘Delivering the renaissance in council-built homes: the rise of local housing companies’ < <http://www.smith-institute.org.uk/book/delivering-renaissance-council-built-homes-rise-local-housing-companies/>> last accessed 5<sup>th</sup> April, 2019, Kenneth Gibb, ‘Funding new social and affordable housing Ideas, evidence and options’ (UK Cache, Social Policy Working Group Paper) <<http://thinkhouse.org.uk/2018/cache1118.pdf>> accessed 5<sup>th</sup> April, 2019

<sup>55</sup> 1972 Local Government Act, ss 123 and 127

that is “reasonably obtainable”<sup>56</sup> unless the Secretary of State consents to the disposal at an undervalue. Guidance mandates that “when disposing of land at an undervalue, authorities must remain aware of the need to fulfill their fiduciary duty in a way which is accountable to local people”.<sup>57</sup> In light of well-being powers and any other non-financial objectives, since 2003, local authorities may sell at an undervalue with no consent required for any disposal of land where the difference between the unrestricted value of the interest to be disposed of and the consideration accepted is £2,000,000 or less.<sup>58</sup>

This “best value” requirement is a constraint on state owned property disposals but often inhibits disposals for less profitable purposes. Many have supported calls to revise the “best value” requirements when releasing public land<sup>59</sup> and have consulted how local and central governments might best dispose of land at an undervalue.<sup>60</sup> The “best value” constraint that currently limits local and central authorities (and even social housing<sup>61</sup>) in their disposal of sites may soon be revised. While this would remove public control, as the aim is to dispose of land at an undervalue to housing associations, community land trusts or charitable housing providers, thereby improving rates of affordable housing, this is a highly desirable change.<sup>62</sup> For as this next section will explain, the privatisation of housing, particular via the right to buy programme, has significant legal, financial and physical consequences.

## 2. *Housing*

Local authorities and Private Registered Providers (PRPs) have sold nearly two million homes to their qualifying tenants under “right to buy”.<sup>63</sup> While individual sales had long been possible and the policy pre-dated the 1979 Government, this profoundly ideological strand of land policy is indelibly associated with Margaret Thatcher. It was her first government that brought in the 1980 Housing Act, granting qualifying English social tenants the right to buy their rented council or social home at a discount. Still operational today, Labour governments refrained from abolishing the scheme, instead reducing discounts, which were subsequently raised again under

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<sup>56</sup> There is an exception for short tenancies, *Circular 06/03: Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained*.

<sup>57</sup> *Ibid*

<sup>58</sup> Local Government Act 1972: General Disposal Consent 2003, *Circular 06/03: Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained*.

<sup>59</sup> For example, Select Committee on Economic Affairs, *Building More Homes* (1<sup>st</sup> Report of Session 2016-17, HL Paper 20, 15 July 2016) para 177

<sup>60</sup> MHCLG, *Planning Reform: Supporting the high street and increasing the delivery of new homes* (2018)

<sup>61</sup> Homes and Communities Agency, *Disposing of Land*, 2015

<sup>62</sup> House of Commons Library, ‘Tackling the Undersupply of Housing in England’ (Briefing Paper Number 07671, 12 December 2018 by Wendy Wilson and Cassie Barton)

<sup>63</sup> House of Commons Library, ‘Introducing a voluntary Right to Buy for housing association tenants in England’ (Briefing Paper, Number 07224, 25 October 2018)

later Conservative governments. Politically popular, the scheme was an “electoral masterstroke”, offering “a life-changing fortune to a relatively small group of people, a group that, not by coincidence, contained a large number of swing voters”.<sup>64</sup> This produced, as Margaret Thatcher noted, an immediate change in tenure, replacing a publicly owned rental property with a privately owned freehold or long lease (“under the Conservative Government, half a million council houses were sold. Half a million families growing up as freeholders”.<sup>65</sup>)

This transfer from rental to owner-occupied housing is significant in a country where more people buy than rent their homes, with just around 64% of households owner-occupiers, 19% renting privately and 17% renting from social landlords<sup>66</sup> (where social landlords include both local authority and private registered providers and some other philanthropic landlords). In recent years, lack of affordability has produced a trend away from owner occupation; in part due to the fact that many once right to buy properties have subsequently been sold to investors. There was no covenant limiting or prohibiting re-sale at the open market price in right to buy contracts or conveyances. As a result, today, it is estimated that approximately 40% of right to buy properties are now in the private rental sector.<sup>67</sup> In London, a 40-50% of formerly right to buy properties are privately rented out, in Milton Keynes (“the buy to let capital of Britain), 70.9% of right to buy properties have been owned and let out by private landlords. This raises the question, does this shift from social to private matter? For those buyers who became owner-occupiers, there are clearly individualized and social benefits. For those now renting privately who might previously have rented from social landlords, however, there are in practice three important differences between the two types of occupation: rent, security of tenure and the quality of the property.

The first difference between social and private tenancies relates to rent. Rent is almost always higher in a private sector rental than under a social tenancy. In England as a whole, the average (mean) rent (excluding services but including Housing Benefit) for households in the social sector was £103 compared with £193 per week in the private rented sector, a difference of £90 per week in 2017-18.<sup>68</sup> In London, where the differences can be far higher, one recent study found averages in Westminster at £129.98 for council rent and £522.69 for private rental.<sup>69</sup> This inevitably has

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<sup>64</sup> James Meek, *Private Island: Why Britain Now Belongs to Someone Else* (Verso, 2014) 191

<sup>65</sup> Speech in Harrogate, 26<sup>th</sup> May, 1983 <<https://www.margaretthatcher.org/document/105349>> accessed 5<sup>th</sup> April, 2019

<sup>66</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report 2017-18* (2018) 2

<sup>67</sup> Nathaniel Barker, ‘Revealed: the scale of ex-RTB home conversions to private rent’ *Inside Housing*, 7<sup>th</sup> December 2017

<sup>68</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report 2017-18* (2018) 13

<sup>69</sup> Office of National Statistics, *Private Rental Market Statistics*, 2017-18 and VOA, *Average Rent by Borough*, 2011-2017

implication for the types of tenants in these properties: tenants renting in the private sector are wealthier.<sup>70</sup> Social rents – whether in council or housing association rents – are set in accordance with a rent formula subject to the Secretary of State’s Direction and Policy Guidance.<sup>71</sup> This has been regularly renewed over recent years, including a mandatory reduction in rents chargeable by social landlords, in order to reduce the amount of housing benefit payable. The rent-setting framework is complex and highly technical, significantly fettering the abilities of social landlords to set rents as they see fit.

In contrast, in the private sector, since 1989, there has been no restriction on the amount a private landlord can charge, subject to a few rarely used mechanisms for Assured Shorthold Tenancies (ASTs) and assured tenants to appeal to the First-tier Tribunal Property Chamber if they think their rent, or rent increase, is excessive and they are willing and able to take on their landlord.<sup>72</sup> The implication of this lack of regulation means that private renters spend a significantly greater proportion of their household income on their housing costs than social. On average, households in the private rented sector spend 33% (including Housing Benefit) of their income on rent, while social renters spend, on average, 28% of their income on rent.<sup>73</sup>

The second difference between social and private tenancies relates to security of tenure. With the proposed abolition of secure tenancies for all tenants, cross-party support in the run up to the Housing Act 1980 had ensured that social tenants would have the indefinite right to occupy their homes, subject only to proven breaches of their lease agreement. This principle remains a fundamental for many social tenants, and part of the discourse for all, despite its erosion by some providers.<sup>74</sup> Certainly, since the 1990s, social landlords have been permitted to introduce a range of different types of tenancies including “probationary” tenancies introduced in the 1990s, “demoted tenancies” reducing security for existing tenants subject to behavioural concerns introduced in 2003 and “flexible” under the Localism Act of 2011, taking into account income, employment status, under-occupancy and behaviour in determining whether or not to renew tenancies. Further restrictions on local

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<sup>70</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report 2017-18* (2018) 11

<sup>71</sup> *The Direction on the Rent Standard 2018*, Ministry of Housing, Communities and Local Government, *Draft Policy on Rents for Social Housing* (2018)

<sup>72</sup> Remaining ‘fair rents’ under the 1977 Housing Act and challenges to ‘market rents’ under ss6, 13 and 22 of the Housing Act 1988 as well as on the expiration of a long lease at low rent under the Local Government and Housing Act 1989 T540 First-tier Tribunal Property Chamber (Residential Property) Guidance on Rent Cases General information about the process

<sup>73</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report 2017-18* (2018) 14

<sup>74</sup> Suzanne Fitzpatrick and Hal Pawson ‘Ending security of tenure for social renters: Transitioning to ‘ambulance service’ social housing?’ *Housing Studies* (2014, 29(5)) 597-615, Beth Watts and Suzanne Fitzpatrick ‘Fixed Term Tenancies: Revealing Divergent Views on the Purpose of Social Housing’ (Herriot-Watt University, 2018)

<[https://pureapps2.hw.ac.uk/ws/portalfiles/portal/22902499/FTT\\_Report\\_July2018\\_WEB\\_2.pdf](https://pureapps2.hw.ac.uk/ws/portalfiles/portal/22902499/FTT_Report_July2018_WEB_2.pdf)> accessed 5<sup>th</sup> April, 2019

authorities use of lifetime tenancies were included in the 2016 Housing and Planning Act (2016), although the Government has not yet implemented these provisions.<sup>75</sup>

In the private sector, there is no equivalent principle of indefinite security of tenure. Assured shorthold tenancies are the default tenure (one recent estimate put the number at 81%) and conventionally run for six to twelve months.<sup>76</sup> An assured shorthold tenancy can be brought to an end either by a possession order (giving the tenant two months notice), surrender or on immigration grounds but otherwise continues as a periodic tenancy on the same terms.<sup>77</sup> The primary legal mechanism used to regain possession (section 21 of the Housing Act 1988) is widely seen as both a real and perceived limitation on security of tenure.<sup>78</sup>

The practical effect of limited security of tenure in the private sector is that these renters move home much more often than social (public) renters. The average length of residence in the private rented sector is 3.9 years in comparison with 11.3 years in the social sector (and 17.5 years for owner occupiers).<sup>79</sup> There is also a significant lower rate of arrears in the private, than in the social, rental sector with only 9% of private renters in arrears in the previous 12 months, compared with 25% of social renters. This matters at a time Shelter have estimated that Eviction from a private tenancy accounts for 78% of the rise in homelessness since 2011. Vocal campaigns call for the Government to “end Section 21”, introducing open-ended tenancies following the Scottish model in the *Private Housing (Tenancies) (Scotland) Act 2016*. So far, however, while the Government has consulted on longer tenancies<sup>80</sup>, and the Labour Party regularly proposes changes in private rental law<sup>81</sup>, there is no concrete reform in sight.

The third difference between social and private rentals is the quality of the property. For despite paying higher average rents for less security of tenure, the quality of private sector rental properties is consistently lower than socially rented properties. Approximately a fifth of homes in the private rented sector (19% or 4.5 million homes failed to meet the Decent Homes Standard in 2017<sup>82</sup>). The introduction of the *Homes (Fitness for Human Habitation) Act 2018* marks an important step forward in

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<sup>75</sup> Ministry of Housing, Communities and Local Government Green paper *New Deal for Social Housing* (Green Paper, Cm 9671, 2018)

<sup>76</sup> Housing Act 1996, s 96, inserting s 19A into the Housing Act 1988. While tenants frequently stay longer on periodic tenancies, 81% of tenancies granted in the private rental sector are for an initial fixed term of 6 or 12 months. Ministry of Housing, Communities and Local Government *Overcoming the Barriers to Longer Tenancies in the Private Rented Sector: Consultation* (2018) 8

<sup>77</sup> Housing Act 1988, s5

<sup>78</sup> David Rhodes and Julie Rugg, *Vulnerability amongst Low-Income Households in the Private Rented Sector in England* (University of York, 2018)

<sup>79</sup> Ministry of Housing Communities and Local Government, *Overcoming the Barriers to Longer Tenancies in the Private Rented Sector: Consultation* (2018) 8

<sup>80</sup> Ibid

<sup>81</sup> The Labour Party, *Labour's New Deal on Housing* (2017)

<sup>82</sup> Ministry of Housing, Communities and Local Government, *English Housing Survey Headline Report 2017-18* (2018) 29

empowering private tenants to challenge landlords about poor quality rental accommodation. It implies into any tenancy agreement a covenant by the landlord that the dwelling (a) is fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease, and (b) will remain fit for human habitation during the term of the lease.<sup>83</sup> While this implied covenant cannot be avoided or contracted out of by the landlord<sup>84</sup>, the lack of security of tenure means that even with local authority assistance with enforcement, private tenants may still be vulnerable to retaliatory eviction<sup>85</sup> and social tenants may be unable to bring a claim as a local authority cannot bring an action against itself.<sup>86</sup>

These three differences between social (public) and private tenancies in rent, security of tenure and quality of accommodation are significant. Not only has the extent of right to buy ensured that social tenancies are now rarer, with the implications this has for the protection of tenants' rights, but the large-scale disposal of central and local government land for housing has made no explicit connection between sales and provision of affordable housing. The privatisation, and fragmentation, of state housing achieved primarily through the right to buy but also through voluntary transfer and council estate demolition, has been an extraordinarily dramatic privatisation.

### 3 *Open and Social Spaces*

Public authorities own large areas of open or recreational property, many of which are leased rather than sold. The development of the “Liverpool One” shopping centre in 2008 introduced a new phase of privatisation in English cities. A small number of companies have agreed long leases with local authorities, conventionally for 250 years, developing new retail sites in – for instance - Bristol, Birmingham and Southampton<sup>87</sup> as well as Westfield Stratford and Westfield Fulham in London.<sup>88</sup> Lease documents are rarely publicly available and are also seldom included in estimates of privatisations. Instead, local authority records often indicate that the land is still owned by the local authority– and of course this is true in relation to the freehold estate – yet there is rarely any mention of the length of the lease(s) now covering the land.<sup>89</sup>

One effect of these long lease privatisations is that the use of land is geared towards making private profit. Private developers create “malls without walls” in collaboration with local authorities that facilitate the development through compulsory purchase,

<sup>83</sup> Inserting a new s.9A(1) into the Landlord and Tenant Act 1985

<sup>84</sup> Landlord and Tenant Act 1985, s.9A(4)

<sup>85</sup> Though note Deregulation Act 2015, s33. Carr, H. Cowan, D. Kirton-Darling E. and Burtonshaw-Gunn, E. *Closing the Gaps Health and Safety at Home, Universities of Kent and Bristol, 2018*

<sup>86</sup> *R v Cardiff CC ex p Cross* (1983) 6 HLR 1, 11

<sup>87</sup> See Hammersons, *Where people and brands want to be: Annual Report 2018*.

<sup>88</sup> Unibail-Rodamco-Westfield 2018 *Full Year Results* available at <  
<https://www.urw.com/en/investors/financial-information/financial-results>> accessed 5<sup>th</sup> April, 2019

<sup>89</sup> For example, see the land on which Cabot Circus is built at <https://maps.bristol.gov.uk/pinpoint/>

master planning and highways stopping up.<sup>90</sup> Such retail redevelopments can cover many acres (42 acres in Liverpool One, 36 acres in Cabot Circus in Bristol) and rarely include communal recreational facilities or seating spaces not linked to restaurants or cafés. The privately owned developments are designed to be profitable for the corporate developers (or subsequent investors) and may, if equality rules are not broken, lawfully exclude anyone there without a licence.<sup>91</sup> This ability for a landowner to exclude provides opportunities for flash mobs where citizens enter as shoppers, before suddenly breaking into a performance (a choreographed dance or light saber fights). Little has changed since Lord Camden held in 1765 that “[b]y the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.”<sup>92</sup>

The licence/trespass binary also graphically illustrates that it is not only entry that is under licence but also, as Scruton LJ held long ago in *The Calgarth* that when “you invite a person into your house to use the staircase, you do not invite him to slide down the banisters”.<sup>93</sup> The ability to exclude means that anyone who is not desired in these privately owned city spaces, anyone homeless, for example, or buskers or performers can be excluded at will. While this may also happen on land owned by central or local government (as there are no rights to sleep in public or perform), discursive arguments can be called raised in respect of state owned land that are resonate differently in privately owned retail or commercial spaces where companies are expected to emphasise profitability and their duty to shareholders.

Such privatised urban spaces are also unavailable for protests, which must be tolerated on state owned land if they don’t cause a nuisance, obstruction and are not temporally or spatially excessive.<sup>94</sup> Once central or shopping areas are privatised by long lease, they are no longer places where people can exercise their human rights to freedom of association or expression (under Articles 10 and 11 of the European Court of Human Rights, respectively). There is no broad duty equivalent to the ‘public forum’ or ‘public accommodation’ tests as in the United States or “quasi-public space” as in Canada.<sup>95</sup> While protests can be limited on state owned land as well, at

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<sup>90</sup> Antonia Layard, “Shopping in the Public Realm” *Journal of Law and Society* (2010, 37.3) 412-441

<sup>91</sup> *CIN Properties Ltd v. Rawlins* [1995] 2 EGLR 130 and *Mark Anderson and Others v. United Kingdom*, Application No. 33689/96 [1998] E.H.R.L.R. 218

<sup>92</sup> *Entick v Carrington* (1765) 2 Wilson, K. B. 275

<sup>93</sup> [1927] 93 at 110

<sup>94</sup> *Appleby v UK* 2003) 37 E.H.R.R. 38, *Corporation of London v Samede* [2012] EWCA Civ 160, *Ineos Upstream Ltd and others v Persons Unknown and others* [2017] EWHC 2945 (Ch)

least there ECHR rights can be raised, which they cannot on state owned land.<sup>96</sup> Regenerating urban and retail areas through the use of long, privately owned, leases, denationalises the governance and privatises objectives for the spaces.

Some places may be subject to specific regulatory regimes over and above property law. There is, for example, a network of legislation affecting the use of parks, particularly in London. In 2017, in *R (Friends of Finsbury Park) v Haringey London Borough Council*, the Court of Appeal held that the use of Finsbury Park as a concert venue for the 2016 Wireless Festival was in breach of the intersecting statutes governing parks.<sup>97</sup> One reason for this was that the local authority's licence to Festival Republic was not *ultra vires* and the decision had, according to the Court of Appeal, been made transparently, following consultation. Another reason was that profit from the event would be hypothecated to fund Haringey Park. These forms of privatisation, or "sweating the assets" by local authorities are required to be *intra vires* as well as compliant with the relevant legislation.

Libraries have been particularly vulnerable to closure given the effects of local authority austerity. The Department of Culture, Media and Sport keeps no central record of the number of library closures, deeming this to be the responsibility of local authorities.<sup>98</sup> Despite this, the Chartered Institute of Public Finance and Accountancy estimates that 127 libraries closed in 2018 alone, exacerbating cuts that have been similar since 2010. While these figures are contested<sup>99</sup> no one doubts that library closures are happening, often followed by disposals of the building in accordance with best value principles, which usually means that former libraries are lost for community or social uses (and are often repurposed as housing). The Public Libraries and Museums Act 1964 creates a statutory duty for local authorities "to provide a comprehensive and efficient library service for all persons desiring to make use thereof".<sup>100</sup> Local library services are required to have regard to the desirability of encouraging both adults and children to make full use of the library service and to lend books and other printed material free of charge for those who live, work or study in the area.<sup>101</sup> Opponents of library closures have both challenged these strategic responsibilities and brought actions for judicial reviews, arguing that specific decisions to close libraries are flawed. These have been successful on both public

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<sup>95</sup> Kevin Gray and Susan Francis Gray, 'Civil rights, civil wrongs and quasi-public space', *European Human Rights Law Review* (1999): 46-102 and Joseph Willia Singer 'No right to exclude: Public accommodations and private property' *Northwestern University Law Review* (1995, 90) 1283-1474.

<sup>96</sup> *Appleby v UK* 2003) 37 E.H.R.R. 38, note the possible exception for a "corporate town" though this is not defined.

<sup>97</sup> Public Health Acts Amendment Act 1890, Local Government Act 1948 and the Local Government Act 1972, see [2017] EWCA Civ 1831.

<sup>98</sup> Hansard HL Vol 795 Col 2148 (19 February 2019)

<sup>99</sup> Department of Media Culture and Sport, "Analysing data: CIPFA statistics and the future of England's libraries" at < <https://www.gov.uk/government/publications/analysing-data-cipfa-statistics-and-the-future-of-englands-libraries/analysing-data-cipfa-statistics-and-the-future-of-englands-libraries> > accessed on 5<sup>th</sup> April, 2019

<sup>100</sup> Section 7

<sup>101</sup> Public Libraries and Museums Act 1964, ss 7(2)(b) and 8(3)(b) respectively.



sector equality duty and administrative law grounds, in the London Borough of Brent and Northamptonshire respectively.<sup>102</sup> Even when the litigation is unsuccessful, the library may nevertheless be saved, perhaps in part because of the delays and opportunities for publicity and scrutiny.<sup>103</sup>

This link between use and the owner's identity is critical to understanding land denationalisation. When central or local governments sell rural or green spaces there is often a change of use.<sup>104</sup> This points to a broader distinction between state- and privately-owned land, that state-owned land is often of a particular type and so regulated by place as well as within a public law framework reflecting the identity of the landowner. Libraries, allotments and playing fields, for instance, are all subject to extensive – often still Victorian – legislation promoting access and use.<sup>105</sup> All of these forms of government land are distinctive by virtue of the type of place. While their regulation usually does not depend on the identity of the landowner, private ownership of parks, allotments, playing fields and libraries is, if not impossible, certainly extraordinarily rare. Once these sites are sold they are unlikely to be replaced at a later date.

#### 4. *Discourse*

Perhaps the most important difference between government and privately owned land is in the discursive space that surrounds government or (rhetorically) public property. In *CIN v Rawlins* in 1995, the security firm (Group 4) employed by the private owners of a shopping centre banned “a small group of locally resident, mostly unemployed youths, of whom the majority were black”. In their widely respected critique of *CIN* decision, Gray and Gray called the decision “a ruling of such feudal resonance” in which “in a decision from which further leave the Court effectively endorsed CIN Properties' peremptory exclusion sine die of persons against whom no charge of misconduct (or other rational ground of eviction) had ever been made out.”<sup>106</sup>

There is no modern caselaw considering a comparable decision to exclude on state owned land. If local authorities wish to exclude certain uses of property today, they are more likely to use of Public Space Protection Orders (on both publicly and

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<sup>102</sup> *R v London Borough of Brent Council ex parte Margaret Bailey* and *R v Northamptonshire County Council* respectively.

<sup>103</sup> See the Crown Street Library in Darlington and *R v Darlington Borough Council ex parte Brenda Page*

<sup>104</sup> Unless the space is taken over by a local charity or community group as a way to minimise local authority expenditure on maintenance, insurance and repairs.

<sup>105</sup> For libraries see, Public Libraries and Museums Act 1964, for allotments, Department of Communities and Local Government, *Allotment disposal guidance: Safeguards and alternatives* (2014), for playing fields, *Disposal or change of use of playing field and school land: Departmental advice for local authorities, maintained schools, special schools, academies and free schools*, May 2015

<sup>106</sup> Kevin Gray and Susan Francis Gray, ‘Civil rights, civil wrongs and quasi-public space’, *European Human Rights Law Review* (1999): 46-102, 46

privately-owned land), which are subject to extensive consultation procedures rather than rely on the authority's inherent right to exclude from land.<sup>107</sup> Network Rail, the owner of train stations and currently a publicly sector company that operates as a regulated monopoly uses withdrawal of implied permission (WiP) notices to exclude people deemed to have engaged in antisocial or criminal behaviour to be excluded, without having to resort to criminal interventions. Broadly, it seems that exclusions from state-owned land are more likely to be discursively tolerated if people are perceived to be "out of place". It is plausible that a state landowner's ability to exclude is not legally different from a private landowner's;<sup>108</sup> it is the discursive context that matters.

Given local authority budget cuts and the effects of austerity budgets privatisation of state owned land sometimes happens for short periods. For example, there is often quite vocal discussion about the use of parks for private purposes, even when this raises funds for the local authority. Many local authorities have monetized parts of their parks in these times of financial austerity. Wandsworth Council, for example, has leased a portion of Battersea Park to Go Ape, a commercial organisation that has installed high ropes and infrastructure into a section of Battersea Park, accessible only to those who pay. While there are few legal restraints here, the decision to privatise this part of the park has been critically discussed in the press (in the way that leases or licences for privately owned Go Ape sites are not).

The sale of courts by the Ministry of Justice has also been subject to repeated and robust public scrutiny. The Justice Committee, and its Chairman Bob Neill, raised repeated concerns about the sales. One [concern] disputed the change of methodology in assessing whether courts were still reasonable accessible<sup>109</sup>, noting that the switch in metric from one hour by public transport to one hour by car, had not been convincingly justified so that the proposal "appears to favour the principle of value for money over the principle of access to justice." The Committee also suggested that court closures leading to longer travel times would inevitably discriminate against some users, in particular elderly people or women with caring commitments and required careful equality impact analysis.<sup>110</sup> Again, these arguments about sales relate to a particular type of government property, which might be raised even if courts were privately owned but provided a public service. It may be the use that is distinctive, rather than the identity of the landowner. The problem remains, however, that the privatisation of particularly types of land – in this case courts – has discernible social effects.

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<sup>107</sup> Kevin Brown, "The hyper-regulation of public space: the use and abuse of Public Spaces Protection Orders in England and Wales." *Legal Studies* (2017, 37(3)) 543-568

<sup>108</sup> This is a question that has not been definitively resolved by the courts, though see *Lindblom J in Corporation of London v Samede* [2012] EWHC 34 (QB).

<sup>109</sup> Letter from the Chair of the Justice Committee to the Secretary of State  
<<https://www.parliament.uk/documents/commons-committees/Justice/correspondence/20180227-Letter-Lucy-Frazer-court-tribunal-estate.pdf>> accessed 5<sup>th</sup> April, 2019

<sup>110</sup> *Ibid.*

Lastly, there is a discourse about transparency in relation to the use and disposal of state owned land. As well as listing requirements, transparency can extend to the uses of land after sale, marking a clear distinction between governmental and privately owned land. In 2016, for example, the (then) Department of Community and Local Government's disposal of extraordinarily large amounts of land to private developers to 'release' land for housing was subject to extraordinary critique by both the National Audit Office and the House of Commons Public Accounts Committee in 2016 for failing to keep adequate records of the number of houses actually built on the land transferred. The Government was stung into responding to these criticisms and put in place guidance and monitoring arrangements, saying that it was "also pleased that the Department has now agreed to monitor the number of homes actually built; the programme is an important part of addressing the current housing shortage and the taxpayer has a right to know how many homes are built as a result of it."<sup>111</sup> Even without legal requirements, state owned land is discursively distinctive and it is the scope for observations about the 'propriety' of state-owned property use or disposals that is perhaps the most important difference between state- and privately-owned property.

## 5. Conclusion

Privatisation of land has proceeded at an extraordinary rate in the last few decades. This has undoubtedly been for ideological reasons, with disposals underpinned by a belief that private landowners operate sites more efficiently than governments, as well as to save on maintenance, insurance and repair costs, particularly in times of austerity. Inevitably, once sold, few, if any, of these sites will be recovered. This is particularly true of iconic sites, for example, Admiralty Arch or the War Office, sold in 2015 and 2016 respectively, both to be turned into luxury hotels. These types of land use are distinguishable both by type and by owner, once the "family silver" is sold and the use changed, these spaces rarely come back.

Studies such as James Meek's *Private Island* and Brett Christophers *New Enclosure* are crucial to continue tracking privatisations underway. Journalists also keep privatisation on the radar, notably the Bureau for Investigative Journalism, the Guardian and the Huffington Post. Studies tracking who owns Britain (as Kevin Cahill did in 2001) or England (as Guy Shrubhole and Anna Powell-Smith continue to do) are hugely important to better understand land ownership in a jurisdiction where titles are recorded rather than mapped cadastrally. Many forms of privatisation are missed, particularly when achieved by the use of leases, including for example, the use of 125 year leases for academy schools, usually on a model document provided by the Department of Education to "help" community and church schools converting to

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<sup>111</sup> HC 634 Twenty-second report of 2016-17, 2 November 2016

academy status transfer their school's land to the academy trust.<sup>112</sup> Privatisation needs to be kept under review, whether sales, long leases or changes in institutional structures.

As this paper has explained, denationalisation matters most in housing, where the differences between social and private renting in relation to rents, security of tenure and housing quality are so striking. While other public law restraints on state-owned property are often limited, they are also still significant, however, facilitating scrutiny, particularly in combination with the public sector equality duty or site-specific duties for libraries, allotments or playing fields. All of the sites that have been sold to private developers, landlords and companies have lost these protections.

Is there a role for land regulation that does not close the stable door after the horse has bolted? One tack is to attend to the differences between state and private property, asking whether additional requirements should be imposed on private owners to raise the level of scrutiny and debate about land use to that equivalent for state owned or social property. This is most obvious in the housing context where greater security of tenure and perhaps even some measure of rent stabilisation are increasingly important asks of the private rental sector (and far further ahead in Scotland). Greater sensitivity could also be paid to individual sites, their spatial and social context, regardless of ownership, so that private piazzas or shopping centres cannot exclude at will. Certainly, we need stricter oversight of privatisation and sale in particular contexts, notably libraries and parks. The change in identity in owner may matter but it is the loss of particular spaces, that only state owners provide, that is more serious still.

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<sup>112</sup> Department for Education, “Academy Conversion Long-term Lease Model” available at <<https://www.gov.uk/government/publications/academy-long-term-lease-model>> accessed 5<sup>th</sup> April, 2019